BANK SIMPANAN NASIONAL v. RUDYSHAM ABDUL RAOF

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[CIVIL APPEAL NO: 12BNCC-37-07-2015]
26 SEPTEMBER 2016

CIVIL PROCEDURE: *Action – Recovery of loan – Claim for – Appeal against dismissal of recovery of loan – Whether borrower's obligations under loan agreement cum assignment ('LACA') released and discharged due to full settlement letter issued by bank – Validity and effect of full settlement letter – Whether full settlement letter constituted a mistake of fact – Suit instituted more than four years after issuance of full settlement letter – Whether bank guilty of laches – Whether full settlement letter and deed of receipt and reassignment constituted strong representation of full release from loan – Whether bank estopped from making claim for payment*

BANKING: *Banks and banking business – Loan facilities – Recovery of loan – Claim for – Whether borrower's obligations under loan agreement cum assignment ('LACA') released and discharged due to full settlement letter issued by bank – Validity and effect of full settlement letter – Whether full settlement letter constituted a mistake of fact – Suit instituted more than four years after issuance of full settlement letter – Whether bank guilty of laches – Whether full settlement letter and deed of receipt and reassignment constituted strong representation of full release from loan – Whether bank estopped from making claim for payment*

CIVIL PROCEDURE: *Action – Recovery of loan – Claim for – Loan agreement cum assignment ('LACA') – Whether rendered valid in pursuance of registration of certificate of authentication – Whether registration of revocation of power of attorney had effect of cancelling LACA – Whether loan agreement entirely unaffected by revocation of power of attorney or deed of receipt and reassignment – Whether loan arrangement continued to subsist*

Bank Simpanan Nasional ('the appellant') granted a housing loan facility of RM116,375 inclusive of MRTA insurance premium of RM3,375 to the respondent ('the facility') in connection with the purchase by the latter of a double storey terrace house ('the said property') pursuant to a sale and purchase agreement with Bakti Dinamik Sdn Bhd ('the sale and purchase agreement'). The financing extended to the respondent was then documented and secured by a loan agreement cum assignment ('LACA') executed by the parties. The respondent, however, failed to effect repayment by instalment, resulting in the appellant taking steps to sell the said property in accordance with the terms of the LACA. The respondent, with the knowledge of the appellant, was able to find buyers for the said property and executed a sale and purchase agreement with the purchasers of the said property for RM85,000 from the respondent ('sale agreement'). Almost the entirety of the

consideration for the sale agreement of RM85,000 was then paid to the appellant as part of the repayment of the facility, who asserted that there still remained an outstanding payment of RM95,923.27 towards full settlement of the facility. This said amount of shortfall formed the basis of the claim by the appellant against the respondent at the Sessions Court. The thrust of the defence of the respondent at the Sessions Court was that the claim filed by the appellant could not be sustained because the appellant had in its letter to the respondent ('the full settlement letter') expressly stated that the respondent had fully settled the facility. This was further followed by the entry by both the appellant and the respondent into the usual legal arrangements to terminate the security arrangement pertaining to the said property. Thus, a deed and receipt of assignment was executed on 21 May 2008, where in consideration of the respondent stated to having repaid all monies owing under the facility to the appellant, the obligations of the respondent under the LACA as well as the security or interests pertaining to the said property were released and discharged. The respondent further denied having received any notice or letter of demand in respect of any shortfall concerning the facility subsequent to the execution of the said deed of receipt and reassignment. The appellant, on the other hand, strongly argued that the full settlement letter constituted a mistake of fact, and that the indebtedness of the respondent to the appellant was supported by other contemporaneous documents. The Sessions Court found that the appellant failed to challenge the validity and effect of the full settlement letter, and that its failure to plead the existence of the full settlement letter in its statement of claim also rendered its claim defective. Consequently, the very basis of the claim instituted by the appellant fell through and coupled with the deed of receipt and reassignment, the appellant no longer had any rights or interests against the respondent or in the said property. Dissatisfied with the decision of the Sessions Court in dismissing the loan recovery claim filed by the appellant against the respondent, the appellant appealed. The issues that arose were, *inter alia* (i) whether the LACA was cancelled by the High Court; (ii) whether the appellant's assertion of a mistake of fact substantiated; (iii) whether the appellant was guilty of laches; and (iv) whether estoppels applied against the appellant.

Held (dismissing appeal; affirming decision of Sessions Court):

(1) It was a key finding of the Sessions Court that the LACA which had been executed by the parties was cancelled and rendered to be no longer valid by the High Court in pursuance of the registration of a certificate of authentication on 29 May 2008. The certificate of authentication is in actual fact an authentication clause concerning the creation of a power of attorney. The revocation of the power of attorney was contained in the deed of receipt and reassignment dated 21 May 2008. It was also

similarly duly authenticated and deposited, and then registered at the High Court on 29 May 2008. It was the registration of this revocation of power of attorney that the Sessions Court held as having the effect of cancelling the LACA. Given the nature and effect of the authentication certificate on the revocation of the power of attorney and its relationship and relevance to the loan and security documentation, this finding by the Sessions Court was with respect plainly erroneous and unsupportable under the law. The only legal effect of the registration of the duly authenticated revocation, as contained in the deed of receipt and reassignment, was purely to render the revocation of the power of attorney effective under the Powers of Attorney Act 1949. (paras 18 & 25)

(2) It is the registration of the revocation that counts, and not the registration of the authentication certificate. The certificate does not have to be registered. To be effective, the power of attorney and the revocation must however additionally be deposited at the High Court. Registration provides the evidence of deposit. As such, that part of the grounds of the decision of the Sessions Court which appeared to have given emphasis on the registration of the authentication certificate was somewhat misconceived under the law. It was therefore clear beyond peradventure that the registration of the deposit of the revocation of the power of attorney merely had that effect – its revocation and cancellation. It had no relevance or application to the assignment, which was terminated by virtue of the execution of the deed of receipt and reassignment, nor to the loan agreement, which was entirely unaffected by either the revocation of the power of attorney or the deed of receipt and reassignment. Strictly, the loan arrangement therefore continued to subsist and had full effect under the law. (paras 29 & 30)

(3) The appellant contended that the part in the full settlement letter which stated that the loan had been fully settled was mistakenly written because it was not disputed that the payment of the proceeds from the sale of the said property by the respondent to the appellant constituted only part of the outstanding sum then due to the appellant from the respondent. However, an evaluation of the acts and documents contemporaneous with the event when tested against the evidence given by the witnesses lend greater credibility to the case of the respondent. It was too conveniently self serving and perfunctory for the appellant if it now asserted quite simply that the deed of receipt and reassignment too was another mistake. Firstly, it was not made clear by the appellant in its pleading and more so in its written and oral submissions, not only the true and legal nature of the said mistake of fact, but also the legal effects and desired relief consequent upon any establishment of the existence of the mistake. There was absolutely no mention whatsoever

whether the mistake fell within the ambit of the Contracts Act 1950 (especially ss. 21, 22 or 23) or that the remedies embodied in the Specific Relief Act 1950 relevant to the mistake were in any manner expected to be invoked. It appeared that the court was urged to merely and readily not acknowledge and totally disregard whatever the appellant now contend to have been mistakenly stated or affected by the same. This was patently both insufficient and unsatisfactory, and thus entirely unacceptable. (paras 39 & 71)

(4) If the alleged mistake was attributed to an individual, neither did the appellant identify the person responsible for the same, and show whether he or she had been made accountable for the lapse. It had also not been demonstrated by sufficient evidence as to how the mistake came about, and whether it was in the nature of a mistake of fact. The full settlement letter could not by any stretch of the imagination be construed as a result of a clerical error. Especially since there were other evidence, including documents which this court referred to, that supported the contents of the full settlement letter. The letters to the solicitors on the discharge, and the very documentation on the deed of receipt and reassignment, which also expressly stated the full settlement of the loan, among others, were key. No less telling was the fact that there was no evidence that the appellant took immediate steps to correct the alleged error soon after, and not to mention the long absence of further communication on any indebtedness of the respondent thereafter until much later. (paras 73 & 79)

(5) An even more compelling basis which weakened the case of the appellant was that it leapt into action far too late in the day. The suit was only instituted more than four years after the issuance of the full settlement letter. The appellant now claimed to be wanting to set the record straight over the alleged error committed several years in the past. The appellant was certainly guilty of laches for having taken an unduly long time to make a claim on the alleged shortfall. Further, it was clearly negligent for a banking institution like the appellant to have committed a fundamental mistake of such colossal proportion. It was almost unthinkable for a bank to have allowed a clearly written full release letter to be issued in error. Also, the appellant was subjected to the trite principle of law that a party could not benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. (paras 80 & 88)

(6) It would be grossly unfair to allow the claim by the appellant when the appellant took more than four years to realise what it now alleged to be a mistake because the respondent had reasonably relied on the full settlement letter and the deed of receipt and reassignment, and that was even after the respondent sought and obtained verbal confirmation from

an officer of the appellant on the effect of full settlement letter releasing the respondent from further liability. The full settlement letter and the deed of receipt and reassignment more than sufficiently constituted strong representation of full release, made even more irrefutable by the lapse of time, and the subsequent reliance by the respondent thereon, all of which operated to estop the appellant from now making a claim for payment. (paras 89 & 91)

Case(s) referred to:

Affin Bank Bhd v. HIB-C Industries Sdn Bhd & Ors [2013] 5 CLJ 689 CA ***(refd)***
Dato' Khalid Hj Ahmad v. Dato' Seri Abdul Rahman Maidin [2012] 10 CLJ 321 HC ***(refd)***
Holt v. Markham [1922] All ER 134 ***(refd)***
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***
Malayan Banking Bhd v. Ching Suit Fee [2012] 3 CLJ 606 FC ***(refd)***
MBF Finance Bhd v. Tiong Kieng Seng [2001] 4 CLJ 38 HC ***(refd)***
New Zealand Shipping Co v. Société des Ateliers et Chantiers de France [1919] AC 1 ***(refd)***
Oh Kuang Liang v. Associated Wood Industries Sdn Bhd [1995] 2 CLJ 961 HC ***(refd)***
Pernec Ebiz Sdn Bhd v. CCI Technology Sdn Bhd & Ors [2014] 1 LNS 679 CA ***(refd)***
Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor [2011] 5 CLJ 159 CA ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Soon Lee Huat Palm Oil Mill Sdn Bhd v. Stable-Win Sdn Bhd [2013] 4 CLJ 640 CA ***(refd)***
Tenaga Nasional Bhd v. Taiko Plantations Sdn Bhd [2013] 2 CLJ 229 HC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
United Merchant Finance Bhd v. Hockwood Holdings Sdn Bhd & Ors [1998] 1 LNS 356 HC ***(refd)***
Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***
Zakaria Daud v. Siti Hussin & Ors [2004] 1 CLJ 844 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 21, 22, 23
Powers of Attorney Act 1949, ss. 3, 4, 5
Rules of Court 2012, O. 55 r. 4(4)

For the appellant - S Ravichandran & Tharuny; M/s S Ravichandaran & Anuar
For the respondent - Mohd Azlan Mashud & Siti Hadijah Ahmad; M/s Azlan Hadijah Salehuddin

Reported by Suhainah Wahiduddin

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JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an appeal against the decision of the Sessions Court which had, after a full trial, dismissed a loan recovery claim filed by the appellant against the respondent.

[2] At the conclusion of the hearing of the appeal, I gave judgment for the respondent, pronounced the key reasons for the same, and dismissed the appeal. This judgment contains the full grounds for my decision.

Key Background Facts

[3] The appellant is Bank Simpanan Nasional, a bank established under the Bank Simpanan Nasional Act 1974. Pursuant to a letter of offer dated 20 November 2000, the appellant granted a housing loan facility of RM116,375 inclusive of MRTA insurance premium of RM3,375 to the respondent ("the facility") in connection with the purchase by the latter of a double storey terrace house held under master title H.S (D) 32202 PT No. 20057, Mukim Rawang, Daerah Gombak, Selangor ("the said property") pursuant to a sale and purchase agreement dated 22 June 2000 with Bakti Dinamik Sdn Bhd ("the sale and purchase agreement").

[4] The financing extended to the respondent was then documented and secured by a loan agreement cum assignment executed by the parties on 11 April 2001.

[5] The respondent however failed to effect repayment by instalment, resulting in the appellant taking steps to sell the said property in accordance with the terms of the loan agreement cum assignment. Whilst the appellant's efforts to dispose of the said property by way of a public action were not successful, the respondent, with the knowledge of the appellant, was able to find buyers for the said property and executed a sale and purchase agreement on 22 December 2005 with Mohd Maimun bin Abdul Rashid and Siti Mariah binti Idris as the purchasers of the said property for RM85,000 from the respondent ("the sale agreement").

[6] Almost the entirety of the consideration for the sale agreement of RM85,000 was then paid to the appellant as part of the repayment of the facility, who asserted that there still remained outstanding a remainder payment of RM95,923.27 as at 28 December 2012 towards full settlement of the facility. This said amount of shortfall formed the basis of the claim by the appellant against the respondent at the Sessions Court filed in January 2013.

Summary Of Principal Contention By Parties

[7] The thrust of the defence of the respondent at the Sessions Court and repeated in this appeal is that the claim filed by the appellant cannot be sustained because the appellant had in its letter to the respondent dated 26 March 2008 in exh. P23 ("the full settlement letter") expressly stated that the respondent had fully settled the facility. This was further followed by the entry by both the appellant and the respondent into the usual legal arrangements to terminate the security arrangement pertaining to the said property. Thus, a deed of receipt and reassignment was executed on 21 May 2008, where in consideration of the respondent stated to having repaid all monies owing under the facility to the appellant, the obligations of the respondent under the loan agreement cum assignment (strictly, the latter) as well as the security or interests pertaining to the said property were released and discharged.

[8] The respondent further denied having received any notice or letter of demand in respect of any shortfall concerning the facility subsequent to the execution of the said deed of receipt and reassignment.

[9] The appellant on the other hand, strongly argued, *albeit* only first pleaded in its reply to the defence of the respondent in the proceedings before the Sessions Court that the full settlement letter constituted a mistake of fact, and that the indebtedness of the respondent to the appellant is supported by other contemporaneous documents.

Essence Of The Decision Of Sessions Court

[10] The trial before the Sessions Court heard two witnesses each from the parties, which gave judgment for the respondent and dismissed the claim by the appellant.

[11] The Sessions Court found that the appellant failed to challenge the validity and effect of the full settlement letter, and that its failure to plead the existence of the full settlement letter in its statement of claim also rendered its claim defective.

[12] It was additionally, and significantly held that by virtue of the registration of the revocation of the power of attorney in exh. P-25, cancelling the earlier registration of the same created and contained in the loan agreement cum assignment, the entire loan agreement cum assignment itself, upon the aforesaid registration of revocation, ceased to have any further legal effect. Consequently, the very basis of the claim instituted by the appellant falls through and coupled with the deed of receipt and reassignment, the appellant no longer has any rights or interests against the respondent or in the said property.

[13] The Sessions Court further made the finding that the appellant was negligent in the discharge of its obligations in respect of the facility which had caused the respondent to believe that the indebtedness had been fully settled. Even if there was a mistake, the appellant ought to have taken proactive steps to notify the respondent and rectified the situation. Instead it was the respondent who inquired with the respondent on the status of the facility, which full settlement was not then denied by the respondent who only realised the alleged mistake after almost five years.

[14] I will now examine the various issues raised in the grounds of appeal submitted by the appellant. In my evaluation of the evidence, I will, where relevant expand further on the respective arguments of the parties as well as the findings of the Sessions Court.

Law On Appellate Intervention

[15] In hearing this appeal, I am reminded of the function of this court as established by case law authorities and have therefore proceeded approaching the same accordingly. The trite principle of law that an appellate court should be slow to interfere with the findings of fact of a trial judge cannot be emphasised enough. In particular, I refer to the decision of the Court of Appeal in the case of *Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor* [2011] 5 CLJ 159; [2011] 1 MLRA 256 where it was stated as follows:

> It was obvious that the learned judge was fully aware of the principle that an appellate tribunal should be slow to interfere with the finding of fact of a trial judge, in this case the Sessions Court Judge, more so as he had the advantage of hearing and observing the demeanour of the witnesses before arriving at his conclusion. This well-established principle, which also has common sense written all over it, was clearly at the back of his mind as he had made mention of the case of *Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500 in his grounds of judgment (see also *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 1 LNS 195; *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178).
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> Despite the inhibition laid down by the above case, the learned judge still set aside the award of future earnings. Why he did that was merely an affirmation that the abovementioned inhibition is not absolute. It is the duty of an appeal court, if satisfied or convinced that the **trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion**, to reverse the decision (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; *Rasidin bin Partorjo v. Frederick Kiai* [1976] 1 LNS 123). Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch 704 had occasion to say:
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> > Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the

> judgment appeal from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong.

[16] The Court of Appeal has also, earlier in the case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 so clearly stated the following often quoted rule, similarly applicable to the instant case:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[17] As such, whilst interference should be a judiciously measured response by an appellate tribunal, it is equally clear that apart from a wrong application of the law, insufficient judicial evaluation of the evidence is also an established basis justifying appellate intervention. This concept was lucidly explained by Gopal Sri Ram JCA (as he then was), delivering the judgment of the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where His Lordship referred to the need to assess the evidence and to weigh them and for good reasons accept or reject them accordingly, as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

A **Evaluation And Findings Of This Court**

*Was The LACA Cancelled By The High Cou*rt?

[18] It is a key finding of the Sessions Court that the loan agreement cum assignment which had been executed by the parties was cancelled and
B rendered to be no longer valid by the High Court in pursuance of the registration of a certificate of authentication on 29 May 2008. Not much is stated in the grounds of the decision what this certificate is all about. I think it is critical that I should now explain what it is.

[19] The certificate of authentication is in actual fact an authentication
C clause concerning the creation of a power of attorney. It is a requirement of s. 3 of the Powers of Attorney Act 1949 ("PA Act") that a power of attorney shall not be valid unless, among others, it is authenticated in accordance with the form specified in the first schedule to the said Act. Only persons mentioned in s. 3 can provide the requisite authentication. The list includes
D an advocate and solicitor. The clause simply entails a declaration in the form of a certification by, in the instant case, an advocate and solicitor that the signature of the person creating the power of attorney, in this case, the respondent, was written in the presence of the advocate and solicitor, is his true signature, and that the respondent had acknowledged to the advocate and
E solicitor that the respondent is of full age and had voluntarily executed the instrument.

[20] It is another basic prerequisite to the validity of a power of attorney that s. 4 of the PA Act stipulated that a true copy of the instrument must be deposited in the office of the Senior Assistant Registrar of the High Court.
F Conversely, any revocation of the power of attorney can under s. 5 only be effective if a true copy of the revocation by the grantor has been deposited in the same office of the Senior Assistant Registrar of the High Court.

[21] Although a power of attorney, not unlike the one in the instant case, commonly involves the appointment of a financier like the appellant as
G attorney of the borrower respondent with power to deal with the Said Property, being the security for the loan (*albeit* at the material time, not a land charge but in the nature of rights, interests and benefits in the sale and purchase agreement pending issuance of the separate issue document of title to the said property), the instrument of the power of attorney and the
H authentication certification which accompanies and forms part of the instrument may be a stand-alone document. It need not be made part of or incorporated into the loan or the security related documentation. But it is common industry practice that the instrument is incorporated in the other loan or security documents, just like in the instant case.

I **[22]** In simple terms, the loan agreement establishes the rights and obligations of the lender and the borrower concerning the loan. It concerns contractual rights of parties *in personam*. The assignment of the rights, title,

interests and benefits in the sale and purchase agreement is a form of security for a loan where the separate issue document of title for the subject property has not been made available. The assignment confers on the assignee the right against the property in question. In the instant case, it is thus a right *in rem* against the said property. The assignment is further supplanted by the power of attorney which is especially useful in giving the lender the power to execute documents as attorney of the borrower when seeking to enforce the foreclosure of the subject property. In the instant case, as is commonly the case in the industry for housing loans without separate individual title, the loan relationship, the security arrangement and the power of attorney are all contained in one composite agreement that is the loan agreement cum assignment.

[23] Thus, to further elaborate, cl. 2 of loan agreement cum assignment is on the covenant to pay, cl. 11 is on assignment and cl. 24 contains the power of attorney. In adherence to the requirement of s. 3 of the PA Act, the certificate to authenticate the creation of the power of attorney is correctly made part of the same document and duly deposited under ss. 4 on 13 April 2001. I should add for emphasis that its deposit is relevant only to the validity of the power of attorney. It does not, under the law concern the validity of the loan or security arrangement.

[24] The revocation of the power of attorney is contained in the deed of receipt and reassignment dated 21 May 2008. It is not disputed that it is also similarly duly authenticated and deposited, and then registered at the High Court on 29 May 2008. It is the registration of this revocation of power of attorney that the Sessions Court held as having the effect of cancelling the loan agreement cum assignment.

[25] Given the nature and effect of the authentication certificate on the revocation of the power of attorney and its relationship and relevance to the loan and security documentation, this finding by the Sessions Court is with respect plainly erroneous and unsupportable under the law. The only legal effect of the registration of the duly authenticated revocation, as contained in the deed of receipt and reassignment is purely to render the revocation of the power of attorney effective under the PA Act.

[26] The deed of receipt and reassignment is typically like in the instant case, a relatively short document. It provides for two primary matters. First, the reassignment of the rights, title, interests and benefits in the sale and purchase agreement back to the borrower and thus the termination of the assignment between the parties. By the execution of the receipt and reassignment on 21 May 2008, all clauses governing the earlier assignment as contained in the loan agreement cum assignment are terminated, fell through and ceased to have any further legal effect. It must be noted that these repercussions flow from the agreement between the parties on the reassignment as contained in the deed of receipt and reassignment, and not from the registration of the authenticated revocation of the power of attorney.

[27] Secondly, and most crucially for present purposes, the deed of receipt and reassignment also provides for the revocation of the power of the attorney. It expressly and quite simply specifies in cl. 5 therein that the respondent revokes the power of attorney under registration number 26744/01 registered on 13 April 2001 which had been deposited in the Kuala Lumpur High Court. This, as mentioned more than once in this judgment, was then authenticated by an advocate and solicitor, which certification also forms part of the deed of receipt and reassignment, duly deposited and registered at the High Court as evidenced by the mark of the stamp of registration on the said certificate with registration number R17028/08 dated 29 May 2008.

[28] It is manifest that under the PA Act and based on the terms of the various documentation themselves, the registration of the revocation has the effect of making the power of attorney cease to have any further validity under the law. It could well have been the case that the entire loan agreement cum assignment had been deposited at the High Court but that was necessitated solely by the fact that it contained that cl. 24 creating the power of attorney, and thus accompanied by the certificate of authentication. It was equally likely that the entire deed of receipt and reassignment was deposited at the High Court, as it contained a revocation of a power of attorney clause and for no other reason. But apart from fulfilling the requirements of ss. 4 and 5 of the PA Act only in respect of the power of attorney in question, such deposits do not in any manner affect the validity of either the loan agreement cum assignment or the deed of receipt and reassignment.

[29] Incidentally, it is the registration of the revocation that counts, and not the registration of the authentication certificate. The certificate does not have to be registered. The certificate, as stated earlier, is necessary to give validity to the power of attorney and to the revocation of a power of attorney. To be effective, the power of attorney and the revocation must however additionally be deposited at the High Court. Registration provides the evidence of deposit. As such, that part of the grounds of the decision of the Sessions Court which appears to give emphasis on the registration of the authentication certificate is in my view somewhat misconceived under the law.

[30] It is therefore clear beyond peradventure that the registration of the deposit of the revocation of the power of attorney merely has that effect - its revocation and cancellation. It has no relevance or application to the assignment, which is terminated by virtue of the execution of the deed of receipt and reassignment, nor to the loan agreement, which is entirely unaffected by either the revocation of the power of attorney or the deed of receipt and reassignment. Strictly, the loan arrangement therefore continues to subsist and have full effect under the law.

Was Mistake Of Fact Pleaded By The Appellant?

[31] The thrust of the appellant's case is that the full settlement letter it had issued to the respondent which purportedly confirmed the full settlement of the loan by the respondent had been issued under a mistake of fact. The Sessions Court however held that as neither the full settlement letter nor the mistake of fact was pleaded in the statement of claim, the same is defective.

[32] However, the appellant had subsequently stated the mistake of fact in its reply to the defence, following reference to the full settlement letter by the respondent in his statement of defence for the claim at the Sessions Court. In my view, this should be construed to mean that mistake of fact had in fact and under the law been properly pleaded, as a reply to the statement of defence is clearly one of the documents of pleadings in civil litigation.

[33] The fact that it was raised in the reply instead of introduced in the statement of claim should not detract from the fact that it was in fact included in the reply before the close of pleadings which thus gave the respondent defendant adequate notice of the issues being relied on by the appellant plaintiff before commencement of trial. Nor can it be legitimately said that its non-mention in the statement of claim despite its subsequent inclusion in the reply to defence occasion any form of injustice to the respondent.

[34] In this connection, I can do no better that reproduce the following often-quoted passage from the judgment of Raja Azlan Shah CJ (Malaya) (as His Highness then was) in the former Federal Court decision in *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10:

> In the present case, the material facts relating to the acknowledgement was not pleaded in the statement of claim; it was also not pleaded in the reply apart from stating that the law of limitation does not apply to the present action. That in our opinion is bad pleading. But it is a matter of indifference to the court whether the plea of acknowledgement is pleaded in the statement of claim or in the reply. If it is raised in the statement of claim, it would make a reply unnecessary and so reduce costs. A further advantage of pleading an acknowledgement in the statement of claim is that the defendant may thereby be led to refrain from raising the issue of limitation in the defence, thus narrowing the area of discovery and reducing costs: see *Bullen & Leake* (12th edition) at page 638. Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply. Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[35] In my judgment, the contention on the mistake of fact made by the appellant should rightfully be considered as having been properly pleaded and not held to have been defective. However, whether reliance on the issue of mistake of fact was justified and substantiated by evidence is of course a different matter. Furthermore, in any event, despite holding it to be defective, the Sessions Court did not entirely disregard the assertion of the existence of the mistake and in fact tested the same against the evidence before the Sessions Court. I will next examine the all-important full settlement letter.

Is Appellant's Assertion of a Mistake of Fact Substantiated?

[36] This is the crux of the appellant's case; that the full settlement letter to the respondent dated 26 March 2008 purportedly confirming full settlement of the loan was written in error because the respondent still owed the appellant a shortfall, which amount as at 28 December 2012 was RM95,923.27.

[37] Given its importance, it would be remiss of me not to reproduce in full the letter in order to demonstrate the full import and purport of the same, as follows:

BANK SIMPANAN NASIONAL

Ruj Kami: BN/KL/SPR/0311/00 26hb. Mac 2008

EN. RUDYSHAM BIN ABDUL RAOF
LEVEL 1, ADMINISTRATION BUILDING
CENTRAL COMPLEX
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
JALAN GOMBAK
53100, KUALA LUMPUR.

Tuan,

PERKARA : PENJELASAN AWAL SKIM PINJAMAN PERUMAHAN GIRO HOME

HARTA : LOT NO. 16-335, BANDAR TASEK PUTERI KUNDANG, SELANGOR

Perkara di atas dirujuk.

Dimaklumkan bahawa pinjaman perumahan tuan/puan dengan pihak Bank Simpanan Nasional telah dijelaskan sepenuhnya/tamat tempoh pada 23hb Nov. 2006.

Sila ambil perhatian, tuan adalah dikehendaki melantik peguam untuk menyediakan borang 'Receipt And Re-Assignment' untuk proses penyerahan hak. Pihak bank akan hanya mengembalikan salinan asal dokumen-dokumen berkaitan setelah borang pelepasan ditandatangani oleh pewakil kuasa bank.

Untuk makluman pihak tuan/puan, pihak bank ada menyediakan peguam panel bagi proses penyerahan hak tersebut, Sekiranya pihak tuan/puan bersetuju untuk menggunakan khidmat peguam panel kami, sila hubungi di talian 03-21623222 samb. 5436/5437 untuk tindakan kami selanjutnya.

Segala kos berhubung dengan perlepasan ini adalah ditanggung oleh pihak tuan/puan.

Tindakbalas yang segera daripada pihak tuan/puan dalam perkara ini sangat diharapkan.

Sekian, terima kasih.

Dengan hormatnya,

BANK SIMPANAN NASIONAL\

Signed
(NARIMAH BT JUSOH)
Bah. Prosesan Kredit (Dokumen)
Jabatan Pengurusan Kredit

[38] In my view, the full settlement letter could not have been expressed more clearly than the above. Issued by the appellant's credit management department no less, it so manifestly and specifically states that the loan has been fully settled or 'dijelaskan sepenuhnya' by the respondent. As a result, the full settlement letter requested the respondent to appoint a lawyer to attend to the preparation of the deed of receipt and reassignment. Hence the following letter:

BANK SIMPANAN NASIONAL

Ruj Tuan : DRR/SN/RUDYSHAM

Ruj Kami : BN/KL/SPR/0311/00 15hb May 2008

TETUAN T.S. ONG & ASSOCIATES
SUITE 18.01, WISMA GOSHEN
PLAZA PANTAI
NO. 5, JALAN 4/83A
OFF JALAN PANTAI BARU
59200 KUALA LUMPUR.

Tel No.: M 03-22876163

Tuan,

PERKARA : PENJELASAN AWAL SKIM PINJAMAN PERUMAHAN GIRO HOME

PEMINJAM : RUDYSHAM BIN ABDUL RAOF

BUTIR HARTA : LOT NO. 16-335, BANDAR TASEK PUTERI KUNDANG SELANGOR

A Perkara di atas dirujuk.

Di kemukakan bersama-sama (4) empat salinan borang Receipt And Re-Assignment yang telah ditandatangani oleh pewakil kuasa kami berserta dokumen-dokumen berikut untuk tindakan tuan selanjutnya.

B 1. (1) Satu salinan Asal Sale and Purchase Agreement yang bertarikh 22hb Jun 2000 diantara Bakti Dinamik Sdn Bhd dan Rudysham Bin Abdul Raof.

2. (1) Satu salinan Asal Loan Agreement Cum Assignment yang bertarikh 11hb Apr 2001 diantara Bank Simpanan Nasional dan Rudysham Bin Abdul Raof.

C 3. (1) Satu salinan Asal Letter of Undertaking yang bertarikh 05hb Jan 2001 daripada Rawang Lakes Sdn Bhd.

4. (1) Satu salinan Asal Letter Of Undertaking Cum Disclaimer yang bertarikh 09hb Feb 2001 daripada EON Bank Berhad.

D Berikut adalah nama dan nombor kad pengenalan pewakil kuasa kami.

SYED AHMAD AZAHARI BIN SYED MOHD. NOR

(NO. K/P: xx-xx-xx)

Akauntan Kredit

E Sila akui penerimaan dokumen ini dengan menandatangani serta mengembalikan salinan pendua surat ini untuk rekod kami seterusnya.

Sekian, terima kasih.

Dengan hormatnya,

F BANK SIMPANAN NASIONAL

signed
(HJH. JAMALIAH BT ABU BAKAR

Bahagian Operasi Kredit (Dokumen)

G Jabatan Pengurusan Kredit

[39] The appellant contended that the part in the full settlement letter which stated that the loan had been fully settled was mistakenly written because it was not disputed that the payment of the proceeds from the sale of the said property by the respondent to the appellant constituted only part H of the outstanding sum then due to the appellant from the respondent. This position is claimed by the appellant to be further supported by the other documents.

[40] Firstly, there is a letter from the appellant to the respondent dated 24 May 2006 stating the redemption statement for the said property and the I full settlement figure for the loan. It also mentioned that the appellant is entitled to demand additional payment if the sum received is insufficient to

fully settle the indebtedness. Specifically, it is provided in an enclosed settlement statement dated 10 May 2006 that the total payable by 1 July 2006 was RM166,078.21.

[41] Secondly, there are various letters from the appellant to the respondent dated 9 January 2007, 27 February 2007 and especially on 21 August 2007, following the sale of the said property by the respondent *via* the sale agreement dated 22 December 2005, stating that after a loan of RM80,300 be extended to the new purchasers by way of a contra arrangement (thus having the effect of extinguishing the respondent's liability to the extent of that amount only), the remainder or shortfall amount of the housing loan to the respondent would be rescheduled in accordance with the guidelines on loan rescheduling.

[42] There are also other letters, including from the respondent, which suggest that there would indeed be shortfall subsequent to the sale of the said property that ought to be settled by the respondent. I think this fairly reflects industry practice, although most of the letters from the appellant are not very clear in stating the distinction between the settlement of indebtedness by the respondent by way of a contra loan to the new purchasers on the one hand, and *via* further payment from the respondent on the shortfall on the other hand.

[43] Of equal significance is the fact that there are also letters from the respondent himself, appealing for better terms to pay the shortfall after the sale of the said property. I thus agree with the submission of the appellant and the finding of the Sessions Court that based on these documents, the indebtedness of the respondent in respect of the shortfall following the sale of the said property was incontrovertible.

Documents And Letters Were Prior To The Full Settlement Letter

[44] However, all these correspondences I just referred to concerned negotiations between the parties in 2007. It cannot be doubted that all these took place prior to the issuance of the full settlement letter on 26 March 2008. On the fact of the full settlement letter, for some reasons, despite the negotiations in 2007, the appellant considered that the loan had been fully repaid by the respondent. More crucially, there are no subsequent letters from the appellant to rectify the alleged mistake in the full settlement letter at any point later in time until closer to the filing of the suit at the Sessions Court in 2013.

Evidence Of Posting Lacking

[45] There are however, three letters that the appellant relied on which it submitted had contradicted and been sent subsequent to the full settlement letter. The first is a letter dated 14 July 2008 which was marked only as ID 27 at the trial. The respondent denied ever receiving this. This letter purportedly set out the rescheduling of the remainder of the indebtedness of

A the respondent to the appellant. The Sessions Court did not accept the same as the trial judge found that the appellant had failed to show the same was delivered to the respondent. I agree with this finding.

[46] The law governing proof of service is fairly settled. But it is also pertinent that the applicable clauses on service as contained in the loan B agreement cum assignment be stated. Clause 42(b), which is not referred to by the Sessions Court, says this:

> The service of any legal process may be given by ordinary post or registered post or AR Registered to the respective address for service of the parties hereto and such legal process shall be deemed to have been C duly served after the expiration of five (5) days from the date it is posted and if delivered by hand on the day it was delivered.

[47] The term "legal process" is defined to include other than pleadings and other originating process, notices required to be given under the agreement as well as correspondences between the parties. I would think the D letter on loan rescheduling would come under within the ambit of "legal process".

[48] However, the Sessions Court referred to cl. 38 on notice which relevant part reads thus:

E > Any notice required to be served under this Agreement shall be in writing and shall be served ... on the borrower by forwarding by ordinary post or registered post or AR registered to the address of service of the borrower hereinbefore stated ... and shall be deemed to be properly delivered at the time when such letter would in the ordinary course be delivered.

F **[49]** There appears to be some form of duplication and overlap but in my view the real and practical difference between the two clauses is the time when service is deemed to have been effected. Clause 42 speaks of five days after posting; cl. 38, in the ordinary course of delivery. Notwithstanding, what is critical, in order to invoke the presumption of delivery, as made abundantly clear by case-law authorities, is that the sender must demonstrate G proof of posting.

[50] The Court of Appeal decision in *Affin Bank Bhd v. HIB-C Industries Sdn Bhd & Ors* [2013] 5 CLJ 689 established that it was immaterial whether the notice of demand was actually delivered or not. It was held that based on the H clause on service, it was sufficient to prove that the notice of demand was properly addressed and put in the post notwithstanding that the said notice might subsequently be returned undelivered by postal authorities. The fact that the AR Card was signed by an unknown person was irrelevant.

[51] Further, in the case of *Yap Ke Huat & Ors v. Pembangunan Warisan* I *Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175, the Court of Appeal held that proof of sending prepaid AR registered is sufficient and said as follows in respect of service or writ of summons by AR registered post:

[20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid AR registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared by Suriyadi Halim J (as he then was) when he said in *Pengkalan Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326:

> In fact under sub-r. 1(1) of O. 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being "Yanti" (not the name of the defendants) did not vitiate that service.

[52] It has also been ruled by the High Court in *MBF Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38 that if delivery is by post, showing proof of posting is sufficient to rely on presumption of service.

[53] In the instant case, the appellant only sought to tender a receipt of registered post to show that the letter had been posted to the respondent. But this purported receipt only indicates the name of the respondent and the guarantor. There is no post office stamp on the receipt, nor was it dated or even initialled by any staff of the post office.

[54] This is plainly insufficient to show the requisite proof of posting and I thus also agree that the Sessions Court's reliance on the testimony of the first witness for the plaintiff appellant, Encik Kamaruzaman Abdul Kayum, senior executive in the retail credit operation (PW1) who was uncertain whether the letter was actually posted to the respondent. The following is the exchange during cross-examination of PW1 on this issue:

> 28Q: Saya rujuk mukasurat 157, ini adalah bukti pengeposannya? En Kamaruzaman tahukan bukti pengeposan? Saya nak tanya berdasarkan bukti pengeposan, surat ini dihantar ke tak?
>
> A: Tidak dapat dipastikan.

[55] On the basis of case-law authorities, the appellant needed only to show that the letter of 14 June 2008 was posted to the correct address. On the evidence, I am satisfied that this was not established.

[56] The appellant relied on another letter subsequent to the full settlement letter. The letter is dated 1 April 2013. Again, the respondent denied having received the same. There was no evidence of posting or delivery. This letter contains, among others, the following statement which purport appears to be to rectify, correct or clarify the confirmation of full settlement made in the full settlement letter:

> 2. Dimaklumkan bahawa surat Bank bertarikh 26/03/2008 hanya memaklumkan tindakan melepaskan kepentingan Bank ke atas hartanah sahaja bukannya baki pinjaman memandangkan masih terdapat baki hutang yang perlu tuan jelaskan.

Without Prejudice Letter Inadmissible

[57] This letter was marked as P24 despite the objections by the counsel for the respondent but was eventually not accepted by the Sessions Court in the grounds of decision principally because it was marked as "without prejudice" and since the maker of the same, Encik Hashim bin Abu Bakar, an executive in the loan collection and recovery department of the appellant bank (PW2) gave evidence that he was unfamiliar with what "without prejudice" actually meant, despite having worked for more than 33 years in the appellant bank, and instead claiming that it was standard practice to state the same. I cannot but agree that based on case-law authorities, letters which are marked as "without prejudice" cannot be accepted as evidence.

[58] I need only refer to the former Federal Court decision in *Malayan Banking Berhad v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17, Chang Min Tat FJ held as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

[59] Communication on negotiations made on "without prejudice basis" is therefore plainly not admissible. As such, the appellant's said letter marked P24 also cannot be accepted as evidence because it was made on without prejudice basis (see also *Oh Kuang Liang v. Associated Wood Industries Sdn Bhd* [1995] 2 CLJ 961; [1995] 4 MLJ 390). More significantly, the weight to be given to the said letter is in any event, trifling at best since the respondent denied having been served with the same and the appellant too did not tender proof of posting. That is not all, for the impugned letter in P24 itself was allegedly issued subsequent to the filing of the claim against the respondent by the appellant. Clearly, any reliance on the letter would be wholly misconceived and constitute an exercise in futility.

[60] Further, nor could the third letter, the purported letter of demand dated 26 November 2012 be considered in this appeal. Even if admitted, it would not in my view, assist the case of the appellant primarily because of the long delay after the full settlement letter of 26 March 2008 (see further discussion on delay below). In any event, I accept the preliminary objection by the respondent, which does not appear to be refuted by the appellant that this letter was not even included in the common bundle of documents and

never surfaced at the trial after its rejection by the Sessions Court. There is thus non-compliance with O. 55 r. 4(4) of the Rules of Court 2012 as it was also not included in the record of the appeal; and nor is there any application to admit the same in this appeal.

Key Contemporaneous Documents Support the Respondent

[61] On the contrary, a couple of key documents which were authorised or executed by the appellant further weaken its contention of the full settlement letter being written in error. The first is the letter from the appellant to the solicitors for the respondent dated 15 May 2008, quite soon after the full settlement letter, primarily to furnish the deed of receipt and reassignment duly executed by the attorney for the appellant, and enclosing various original documents, such as the sale and purchase agreement and the loan agreement cum assignment, for the purpose of the discharge of the security for the loan. This letter was reproduced earlier in this judgment.

[62] Secondly, is the very deed of receipt and reassignment itself, executed by the parties, and containing as is usually the case at any rate, the following cl. (d) in its recital:

> The assignor has on or before the date hereof fully paid and settled to the Lender the Loan together with interest thereon and all whatsoever moneys due and payable under the Loan Agreement cum Assignment.

[63] Further, cl. 1 states that "in consideration of the assignor having repaid all moneys owing to the lender ..." All these are plainly entirely consistent with the full settlement letter.

[64] I am, in this context reminded of the observation by Chang Ming Tat FJ on the importance and value of contemporaneous acts and documents, and the need to test oral testimonies against them, who in the case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, expressed as follows:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings*. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ... (emphasis added)

[65] Both PW1 and PW2 testified that the full settlement letter was a standard letter intended to ask the respondent to appoint lawyers to handle the deed of receipt and reassignment following the sale of the said property

and to enable change of ownership of the same in favour of the new purchasers. But this explanation, whilst not, in my view, inherently improbable, is not shown to be corroborated by any other documentary evidence, and in any event does not explain the existence of the clearly worded clauses as contained in the deed of receipt and reassignment referred to above. Further, the maker of the full settlement letter was significantly never called to testify. Neither PW1 nor PW2 had any direct knowledge on the full settlement letter and the deed of receipt and reassignment when they were prepared and signed.

[66] An evaluation of the acts and documents contemporaneous with the event, when tested against the evidence given by the witnesses would in my view lead to lend greater credibility to the case of the respondent. It would be too conveniently self-serving and perfunctory for the appellant if it now asserts quite simply that the deed of receipt and reassignment too to be another mistake.

[67] For completeness, I should also allude to P-14 being the redemption statement dated 30 August 2007 which clearly stated the redemption sum being RM80,300. And this was a date prior to the full settlement letter. Ordinarily in any event, it is standard banking credit practice that redemption of the loan and release of security back to the borrower or security provider is only allowed on the basis of full repayment of a loan. This means that if the security is to be sold to another party, the difference between the total outstanding and the purchase price of the relevant secured property to be sold must commonly, for the protection of the lender, be settled first by the borrower (by the sale and its proceeds be channelled to the lender towards reducing the loan repayment amount) before the purchaser is permitted to fully redeem and thus for the bank to release the security.

[68] Even if it is true that in this case, there is a differential amount between the total loan outstanding and the purchase price, there is a serious lack of documentary evidence accompanying the full settlement letter, the deed of receipt and reassignment or any documents thereafter, such as in the form of a fresh agreement or a clearly written letter to notify the borrower/ respondent of the newly reduced indebtedness arrangement and repayment schedule of the amount of any shortfall post-disposal of the said property. Nothing was tendered by the appellant in this regard.

[69] Even then, the existence of such an arrangement (which is not shown) would have been considered uncharacteristic credit management practice because it would mean that the said differential amount (the amount actually claimed by the appellant in the suit) was entirely unsecured. This would be an oddity since the indebtedness was previously secured and yet the appellant allowed the purported remainder sum to exist without security (following the sale of the secured property) despite alleging that the banking relationship with the respondent to already have been problematic by then.

Was It A Mistake?

[70] The appellant made reference to a number of cases, four to be exact, to support its submission that the full settlement letter contained a mistake of fact and ought thus to be disregarded. The mistake then is said to have led to the execution of the deed of receipt and reassignment.

[71] I do not find the assertion of mistake of fact to be at all convincing. I say this for two principal reasons. First, it has not been made clear by the appellant in its pleading and more so in its written and oral submissions, both at the trial and now before me, not only the true legal nature of the said mistake of fact, but also the legal effects and desired relief consequent upon any establishment of the existence of the mistake. There is absolutely no mention whatsoever whether the mistake falls within the ambit of the Contracts Act 1950 (especially ss. 21, 22 or 23) or that the remedies embodied in the Specific Relief Act 1950 relevant to mistake are in any manner expected to be invoked. Based on the pleadings and submissions of the appellant, it appears that the court is urged to merely and readily not acknowledge and totally disregard whatever the appellant now contends to have been mistakenly stated or affected by the same. This, to my mind, is patently both insufficient and unsatisfactory, and thus entirely unacceptable.

Case-law Submitted By Appellant Do Not Support Its Case

[72] The second reason is that the four cases do not truly assist the case of the appellant. This is apparent even based on the passages quoted by the appellant in its written submissions. Firstly, in the Court of Appeal decision in *Soon Lee Huat Palm Oil Mill Sdn Bhd v. Stable-Win Sdn Bhd* [2013] 4 CLJ 640; [2013] MLJU 257 it was held as follows:

> [27] The difference between a mistake of fact and a mistake of law is very clear. To put it simply, mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. Whereas, a mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment, upon facts, and necessarily presupposes that the person forming it is in full possession of the facts. (See *Black's Law Dictionary Free Online*, 2nd Edition).

[73] In my view, it would be incongruous to attribute to the appellant, an established banking institution created by an Act of Parliament, the subjective state of mind concerning unconscious ignorance, forgetfulness or belief in the present existence of a matter which does not exist. If the alleged mistake is attributed to an individual, neither did the appellant identify the person responsible for the same, and show whether he or she had been made

A accountable for the lapse. In any event, it has also not been demonstrated by sufficient evidence as to how the mistake came about, and whether it was in the nature of a mistake of fact stated by the Court of Appeal. I must add that in that case, the Court of Appeal found that there was no mistake and reversed the decision of the High Court.

B **[74]** The second case referred to by the appellant is a Court of Appeal decision in *Zakaria Daud v. Siti Hussin & Ors* [2004] 1 CLJ 844; [2003] 2 MLRA 429. The appellant referred specifically to the following passages from the judgment of Gopal Sri Ram JCA:

C > Now, the principles governing a case such as the present are very well settled. They were settled as long ago as the 18th century. In *Shelburne v. Inchiquin* [1784] 1 Bro. CC 338, Lord Thurlow held that **the evidence in support of the proof of common mistake should be irrefragable. In other words it should be cogent and must meet a very high standard of proof**. The rationale behind this requirement is not difficult to discern. The
D > transaction entered into between the parties and by the documents executed between them voluntarily and for good and valuable consideration are not to be set aside by the court wily nily for the slightest reason. Were it so, the law would be riddled with uncertainty and commerce will come to a standstill.
>
E > ...
>
> The learned judge then went on to deal with the law of mistake. He referred to the following paragraph in 27th edn, vol. 1 on Chitty on Contracts paras 5-045 (pp. 43-44 of Rekod Rayuan):
>
> > *The burden of proof is on the party seeking rectification. He must produce 'convincing proof' not only that the document to be rectified was not in*
F > *accordance with the parties' true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions.* It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. The denial of one of the parties that the
G > deed as it stands is contrary to his intention ought to have considerable weight, and unless the other party can convince the court that the document does not represent both parties' intentions at the time of execution, rectification will only exceptionally be ordered. (emphasis added)

H **[75]** I fail to discern in what manner the above passage supports the position of the appellant. There is no mention in the instant case before me whether rectification is of relevance, and neither is there clear evidence, let alone of having the quality of being cogent, that there was a mistake when it was not even shown how the alleged mistake came about. If anything, this second case actually further weakens the case of the appellant.

I

[76] The third case relied on by the appellant to support its contention on the full settlement letter being a result of a mistake is a High Court decision in *Dato' Khalid Hj Ahmad v. Dato' Seri Abdul Rahman Maidin* [2012] 10 CLJ 321; [2010] 17 MLRH 646. Again, the appellant extracted certain passages from the judgment, the more pertinent of which in my view are as follows:

> 28. The state of mind of the Plaintiff at the material time is only relevant insofar as to describe the misrepresentation as innocent, fraudulent or negligent. Such identification serves to determine the type of relief available. Most importantly, the statement or representation of the Plaintiff must have been relied on by the Defendant; and at the time of entry into the agreement the Plaintiff must have the "intention, or at least realize, that the statement will, or probably will, be relied upon by the" Defendant - *Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd*, *supra*, at 162. In *Zakaria Daud v. Siti Hussin & Ors* [2004] 1 CLJ 844; [2003] 2 MLRA 429; [2004] 2 AMR 176 Gopal Sri Ram JCA [as he then was] opining the decision of the Court of Appeal in a claim where mistake was raised made a highly pertinent remark that must be borne in mind when dealing with commercial claims and where mistake, or even misrepresentation is raised ...

[77] The above-said actually concerns misrepresentation, and not mistake. The High Court approvingly referred to the judgment of Gopal Sri Ram JCA in *Zakaria Daud v. Siti Hussin & Ors* referred to above, in the context of a mistake to be applicable to misrepresentation as well. So this has no real assistance to the appellant in the instant case.

[78] The fourth case cited by the appellant is *United Merchant Finance Bhd v. Hockwood Holdings Sdn Bhd & Ors* [1998] 1 LNS 356; [1998] 5 MLRH 152. The appellant referred to the following parts of the judgment of the High Court:

> In the case of *Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor* [1985] 1 MLRA 535; [1985] 2 MLJ 332, Mohd Azmi SCJ at p 334 had this to say about rectification in a case where a dispute had arisen on the construction of a document as a result of an obvious typographical error:
>
> > Be that as it may, it is an established principle that rectification is not necessary if there is obvious mistake or misnomer in a document. No court will allow people to take advantage of a misnomer or typing error when everyone knows what was intended. Thus in *Nittan v. Solent Steel* [1981] 1 Lloyd's Rep 633, Lord Brightman LJ said at p 639:
> >
> > > In my opinion, in construing a document, the court is at liberty, as a matter of construction, to correct a misnomer. A misnomer is not, in my view, necessarily a mistake which requires the equitable remedy of rectification. The misnomer may be a mere clerical error. A simple example would be the use in a conveyance of the expression 'the vendor' when clearly 'the purchaser' was intended. It is not necessary to rectify the conveyance to enable it to be read and take effect as the parties plainly intended.

[79] I do not think it can be doubted that the nature of the alleged mistake in the instant case is not anywhere near or in any fashion comparable to what the abovementioned judgment in the case of *United Merchant Finance Bhd v. Hockwood Holdings Sdn Bhd & Ors* described as more like a misnomer or arising from a clerical error. In the instant case, the full settlement letter cannot by any stretch of imagination be construed as a result of a clerical error. Especially since there are other evidence, including documents I referred to, which support the contents of the full settlement letter. The letter to the solicitors on the discharge, and the very documentation on the deed of receipt and reassignment which also expressly stated the full settlement of the loan, among others, are key. No less telling is the fact that there is no evidence that the appellant took immediate steps to correct the alleged error soon after, and not to mention the long absence of further communication on any indebtedness of the respondent thereafter until much later. These cases are thus of no assistance to the appellant.

Long Delay – Appellant Guilty of Laches

[80] An even more compelling basis which weakens the case of the appellant is that it leapt into action far too late in the day. The suit was only instituted in 2013. Factually, this was some more than four long years after the issuance of the full settlement letter. The appellant now claimed to be wanting to set the record straight over the alleged error committed several years in the past. I therefore apply the principle in *Tenaga Nasional Bhd v. Taiko Plantations Sdn Bhd* [2013] 2 CLJ 229; [2011] 9 MLJ 76 and similarly hold that the appellant is certainly guilty of laches for having taken an unduly long time to make a claim on the alleged shortfall. The following passages from the judgment of the High Court are of relevance:

> [193] Apart from what is stated above, the court is of the considered view that the plaintiff's claim against the defendant ought also to be **dismissed because there are merits in the defendant's defences of limitation and laches**.
>
> [194] **Here the plaintiff's claim dates back to 13 December 1986. But the plaintiff's writ was only filed on 14 November 1994 which is a good 7 years and 11 months later**. The plaintiff's cause of action against the defendant is for breach of contract. The limitation period as provided for in s. 6(1)(a) of the Limitation Act 1953 is six years from the date the cause of action accrued. Here that date would be 13 December 1986. So the plaintiff's claim is clearly time barred. On this ground alone, the plaintiff's claim ought to be dismissed with costs.
>
> [195] *The plaintiff is also guilty of laches because there was an unduly long delay on the part of the plaintiff to discover the alleged wrong wiring in an area which is completely within its domain and which was also sealed off and not accessible to the defendant's workers and agents*. Both the plaintiff and the defendant are companies doing business. In any business the object must be to do their trade professionally in order to supply its services as efficiently as possible

to its clients in order to earn profits for the company and shareholders. **It would be absurd if the plaintiff can make a mistake and keep it going for seven years and then just transfer its loss arising from its mistake to the defendant**.

[81] This is far too late in the day for an action to be filed by the appellant. It is much more consistent with the presence of an afterthought. The appellant is thus patently guilty of laches.

May Be A Negligent, But Not A Simple Mistake

[82] Further, taking the appellant's case at its highest, even if it was true that the full settlement letter was a mistake, as mentioned earlier, it cannot be validly characterised to be in the nature of a simple mistake like a typing error. It was beyond an innocent mistake. It is clearly negligent for a banking institution like the appellant to have committed a fundamental mistake of such colossal proportion. The banking industry is one of the most strictly regulated industries; and internal controls and governance process are similarly expected to exhibit stringent adherence to standard operating procedures.

[83] It was almost unthinkable for a bank to have allowed a clearly written full release letter to be issued in error. The letter must have been written with the benefit of supporting documents including the relevant credit files. It is, to put it mildly, especially surprising that the full settlement letter was then acted on by the valid execution of the deed of receipt and reassignment by the authorised signatories for the appellant bank for this purpose. Surely such an important documentation releasing security of the bank would have necessitated a careful review of the true status of the loan.

[84] Instead, as mentioned above, the deed of receipt and reassignment states in no uncertain terms that the loan has been fully settled by the respondent. At the risk of repetition, I reiterate that recital in item (d) to the deed of receipt and re-assignment in P-25 plainly states that the respondent, as the assignor, has "fully paid and settled to the lender the loan together with interest thereon and all whatsoever moneys due and payable under the loan agreement cum assignment."

[85] All relevant information must have certainly been within the internal information management system and credit files of the appellant to start with. If there was a mistake the necessary evaluation and review prior to execution appeared not to have been done in a manner befitting of a financial institution, or at all. And then there was silence for more than four years. Indeed one cannot even discount the possibility, however implausible, that for whatever reasons, the appellant might have genuinely then decided to release the full indebtedness of the respondent after the sale of the said property.

[86] In any event, crucially, neither do the witnesses for the appellant provide much assistance either on the questions pertaining to the purported letters on rescheduling and on the true status of the loans in P-24 and ID-27 mentioned earlier, or even generally on other issues to strengthen the case for the appellant, for both PWI and PW2 were not the officers who handled or had knowledge of the loan account of the respondent at the material time. The following exchanges during cross-examination of the first witness for the plaintiff appellant, Encik Kamaruzaman Abdul Kayum, senior executive in the retail credit operation (PW1) are of interest:

17Q : Ada tak pihak plaintif memaklumkan kepada defendan atau pun peguam cara defendan, bukan saya peguam cara defendan ketika membuat DRR [Deed of Receipt and Reassignment] tersebut, niat sebenar plaintif menandatangani DDR?

A : Tidak pasti.

18Q : Sebelum DDR disempurnakan, ada tak maklum kepada peguamcara defendan baki hutang tertunggak?

A : Tidak pasti.

...

23Q : Saya nak tanya, ada tak selepas surat 26.03.08 penjelasan sepenuhnya itu kan, selepas surat itu dan sebelum DDR disempurnakan, ada tak minta baki tertunggak yang dikatakan terhadap defendan? Hutang tertunggak yang diperkatakan? Ada minta?

A : Tak pasti.

24Q : Selepas DRR disempurnakan, ada minta?

A : Tak pasti.

...

50Q : Just untuk confirmation, saya ulangkan bahawa sebenarnya Encik Kamaruzaman tak ada pengetahuan tentang surat [26.03.08] ini?

A : Tak ada.

70Q : Setuju atau tidak saya cadangkan bahawa pinjaman ini telah diselesaikan sebab amaun penebusan tersebut telah dijelaskan sepenuhnya, di mana pihak plaintif tidak menuntut apa-apa tunggakan selepas amaun penebusan hartanah dijelaskan dan sebelum DRR disempurnakan?

A : Saya tak pasti.

[87] The other witness, PW2 gave evidence primarily in respect of the impugned letter in P24 which, as mentioned earlier, has already been ruled to be inadmissible. Much more importantly, and as mentioned, in what

would further diminish whatever substance in the case of the appellant, the appellant had chosen not to call the actual maker of the all-important full settlement letter or the deed of receipt and reassignment nor anyone who could claim to have direct personal knowledge on the same to testify as a witness.

No Benefit from Own Default

[88] It is also my finding that the appellant is additionally subject to the trite principle of law that a party cannot benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co v. Société des Ateliers et Chantiers de France* [1919] AC 1).

[89] It would therefore be grossly unfair to allow the claim by the appellant when the appellant took more than four years to realise what it now alleges to be a mistake because the respondent had reasonably relied on especially the full settlement letter and the deed of receipt and reassignment, and that was even after the respondent sought and obtained verbal confirmation from an officer of the appellant on the effect of full settlement letter releasing the respondent from further liability. The respondent's testimony on this point was also not challenged by the appellant.

Estoppel Applies Against Appellant

[90] At the same time, in my assessment, the evidence also separately supports the dismissal of the claim by the application of the principle of estoppel. In *Holt v. Markham* [1922] All ER134, a case approvingly referred to by the Federal Court in *Malayan Banking Bhd v. Ching Suit Fee* [2012] 3 CLJ 606; [2012] 2 MLJ 289, Scrutton LJ held thus:

> I think this is a simple case of estoppel. In this case the plaintiffs have, in my view, represented to the defendant that he is entitled to a sum of money as a gratuity and have paid it, and after a lapse of time sufficient to enable mistake to be detected and rectified, the defendant has acted on the representation and has spent the money before any claim on him for return has been made.

[91] In the instant case, the full settlement letter and the deed of receipt and reassignment more than sufficiently constituted strong representation of full release, made even more irrefutable by the lapse of time, and the subsequent reliance by the respondent thereon, all of which operate to estop the appellant from now making a claim for payment.

A **Other Observations**

[92] In order to summarise the overall finding on the case of the appellant, I must further make a brief mention of the decision of the Court of Appeal in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 which reaffirms the rule that "he who asserts must prove", whereby Siti B Norma Yaakob JCA (as she then was) instructively held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance C of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has deniedeven making one. For this very reason, the adverse inference under section 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would D work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

E **[93]** In the instant case, there is a paucity of evidence to warrant the finding of a valid claim against the respondent on the balance of probabilities. The documents support the position of the respondent quite overwhelmingly, and the witnesses relied on by the appellant to prove its case, did little to advance it. This is not to mention its failure to call the maker of the full settlement F letter.

[94] It is insufficient for the appellant to submit that in the final analysis the respondent is unjustly enriched. The appellant must prove its case. Even the argument of the appellant that the full settlement letter, especially the part concerning full payment of the loan being mistakenly written was not G elegantly put across. Not to mention it was only introduced after the respondent raised it in his defence. The issue of the mistake was not adequately dissected; and evidence which is claimed to corroborate its case was found truly wanting.

[95] In this regard, reference to the following passage from the judgment of H the Court of Appeal in *Pernec Ebiz Sdn Bhd v. CCI Technology Sdn Bhd & Ors* [2014] 1 LNS 679; [2015] 2 MLJ 117 would not be out of place:

> **The submissions for the appellant closed with the submission that when the High Court rejected the claim, the respondents ended up benefiting accidentally on phones that they did not return**. It was clearly a case I where the appellant's case would have been better served had there been less indulgence in and emphasis on legal argument and more effort put to tabulate the numbers and location of the payphones. *Even though the*

burden upon a plaintiff in a civil suit is only to prove its case upon a balance of probabilities, it must present its case sufficiently clearly to do so. It cannot merely file pleadings, file bundles of documents, proceed to trial, call witnesses to testify and argue on the various issues and expect the court to make out the case on its own for one party or the other. The submissions failed to analyse the pleadings, the facts and the evidence as against the issues requiring a decision, and to tabulate the same so that a logical and reasoned decision could be made that satisfied the fundamental requirement of a fair and just decision. Where the party upon whom the burden of proving its case lies fails to do so, it fails to prove its case and its action must be dismissed. (emphasis added)

Conclusion

[96] Accordingly, on the basis of the foregoing myriad of reasons, it is my judgment that the decision of the Sessions Court Judge refusing the claim of the appellant against the respondent be affirmed for the appellant had failed to prove its case on a balance of probabilities, and that this appeal be therefore dismissed, with costs.